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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **IN AND FOR THE COUNTY OF SANTA CLARA**

11 AMERICAN FEDERATION OF STATE,
12 COUNTY, AND MUNICIPAL EMPLOYEES,
13 LOCAL 101, on behalf of its members,

14 Plaintiff and Petitioner,

15 v.

16 CITY OF SAN JOSÉ and DEBRA FIGONE in
17 her official capacity as City Manager,

18 Defendants and Respondents,

19 THE BOARD OF ADMINISTRATION FOR
20 THE FEDERATED CITY EMPLOYEES
21 RETIREMENT PLAN,

22 Necessary Party In Interest.

Case No. 1-12-CV-227864;
Consolidated with Case No. 1-12-CV-225926
[Consolidated with cases, nos. 1-12-CV-225928,
1-12-CV-226574 and 1-12-CV227864]

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF AND PETITION FOR WRIT OF
MANDAMUS**

1. Unconstitutional Impairment of Contract
(Cal. Const. Art. I § 9 & Civ. Code § 52.1)
2. Unconstitutional Bill of Attainder
(Cal. Const. Art. I § 9 & Civ. Code § 52.1)
3. Unconstitutional Taking of Private Property
(Cal. Const. Art. I § 19 & Civ. Code § 52.1)
4. Unconstitutional Taking of Private Property
Without Due Process
(Cal. Const. art. I § 7 & Civ. Code § 52.1)
5. California Pension Protection Act
(Cal. Const. Art. XVI § 17 & Civ. Code § 52.1)
6. Violation of Constitutional Right to Petition
(Cal. Const. Art. I §§ 2 & 3 & Civ. Code § 52.1)
7. Illegal *Ultra Vires* Tax, Fee or Assessment
(Cal. Const. Art. I, § 7 & Civ. Code § 52.1)
8. Promissory Estoppel and Equitable Estoppel
9. Request for Declaratory Relief
(Code of Civ. Pro. § 1060)
10. Request for Injunctive Relief
(Code of Civ. Pro. §§ 525, 526 & 526(a))
11. Petition for Writ of Mandate
(Code of Civ. Pro. § 1085)

1 Plaintiff American Federation of State, County, and Municipal Employees, Local 101 alleges
2 as follows:
3

4 I. INTRODUCTION

5 1. Plaintiff and petitioner ("Plaintiff" or "Petitioner") brings this suit for declaratory,
6 injunctive, and writ relief in order to declare unconstitutional under the California Constitution the
7 "Sustainable Retirement Benefits and Compensation Act" ("Act" or "Measure B"), approved by the
8 electorate of the City of San José ("City") on June 5, 2012, and to bar its implementation by
9 defendants and respondents ("Defendants" or "Respondents").

10 2. Plaintiff Local 101 of the American Federation of State, County, and Municipal
11 Employees ("AFSCME" or "Union") is the representative of certain groups of miscellaneous
12 employees employed by the City and who are members of the City's Federated City Employees
13 Retirement Plan (collectively referred to herein as "miscellaneous employees," "employees," or
14 "members").

15 3. Under the California Constitution, public employee pension benefits are deferred
16 compensation, and a public employee has a constitutionally-protected contractual and property right
17 to receive such benefits under the terms and conditions in effect at the time such employee accepts
18 employment.

19 4. A public employee's right to the benefits established under a pension plan vests upon
20 commencing employment, because the right to such benefits represents a forbearance of wages or
21 other compensation otherwise immediately earnable through the employee's ongoing service.

22 5. These rights are vested and cannot be reduced or eliminated without impairing this
23 constitutionally-protected contractual obligation and property right.

24 6. Under California law, a right to retiree health benefits and/or benefits in the form of a
25 post-retirement cost of living adjustments ("COLA") may also vest by implication. The resulting
26 contract and property right to receive these forms of benefits, on terms substantially equivalent to
27 those offered by the public employer, similarly arises upon acceptance or continuation of
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1 employment. Once vested, they cannot be reduced or eliminated without impairing this
2 constitutionally-protected contractual obligation.

3 7. In a memorandum dated December 1, 2011, City Mayor Chuck Reed submitted to the
4 City Council a series of recommendations. In relevant part, he recommended that the City Council
5 refrain from declaring a "Fiscal and Service Level Emergency," and further recommended the City
6 Council adopt a resolution calling for a municipal election on June 5, 2012, for the purpose of placing
7 on the ballot an amendment to the City Charter's ("Charter") provisions governing City employee
8 retirement security.

9 8. By memorandum dated February 21, 2012, City Manager Debra Figone proposed to
10 the Mayor and City Council an Act providing for such amendments to the City Charter, authorizing
11 promulgation of ordinances for the purpose of, *inter alia*, reducing City employee retirement security
12 and reducing wages for City employees who "choose" to retain the level of retirement security
13 promised to them (and for which they have contributed a portion of their wages). Attached to the
14 memorandum were the terms of the Act proposed for placement on the ballot.

15 9. The proposal also called for convening a June 5, 2012 special municipal election for
16 the purpose of placing the Act on the ballot for referendum (as amendments to the City Charter must
17 be approved by the City's electorate).

18 10. On March 6, 2012, the City Council adopted the proposal and directed placement of
19 the Act attached thereto on the June 5, 2012 Ballot.

20 11. The Act was subsequently designated "Measure B" on the ballot (hereinafter referred
21 to as "Measure B.")

22 12. On June 5, 2012, the City electorate passed Measure B by referendum.

23 13. On or about July 5, 2012, the City Clerk certified the results of the June 5 election,
24 including passage of Measure B.

25 14. Among other things, Measure B purports to amend the City Charter such that vested
26 employees' pension benefits will be reduced and additional obligations on the part of employees will
27 be incurred with respect to the City's obligation to fund the retirement security it has promised.
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1 15. As applied to current employees participating in the Federated City Employees
2 Retirement System, Measure B violates the California Constitution because it substantially impairs
3 the affected employees' right to retirement benefits that vested when they commenced employment
4 and/or continued their employment with the City.

5 16. For example, Measure B violates the California Constitution with respect to current
6 employees because it, *inter alia*:

7 a. Reduces and eliminates portions of employee retirement benefits that are or have
8 become vested;

9 b. Imposes conditions subsequent on the right to receive retirement benefits already
10 earned;

11 c. Is an unconstitutional bill of attainder, as it shifts the burden of financing public debt
12 upon a small class of private parties, and its purpose is to punish such individuals for refusal to
13 relinquish their constitutionally-protected rights and property;

14 d. Constitutes an unconstitutional taking of private property for public use without
15 providing the affected employees with just compensation;

16 e. Constitutes an unconstitutional taking of private property for public use without
17 affording the affected employees with substantive due process;

18 f. Is an unconstitutional retroactive law as it subjects employees to liabilities previously
19 incurred by the City, and obligates active employees to fund liabilities previously incurred by the
20 City with respect to its retiree health obligations;

21 g. Is unconstitutional because it violates the "California Pension Protection Act";

22 h. Violates employee-members' constitutional right to petition the courts by imposing a
23 penalty on employee-members who successfully challenge the legality of the Act through a "poison
24 pill" provision; and

25 i. Imposes an illegal and improper tax by imposing on a specific group of individuals an
26 excise of wages for the purpose of funding the City's general obligations, and such tax or excise is
27 targeted at those individuals who can neither (i) afford to relinquish their constitutionally-protected
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1 rights to a pension they have earned; or (ii) choose not to forego their constitutionally-protected right
2 to receive the pension they have earned

3 17. Additionally, the City should be prohibited from implementing Measure B pursuant to
4 the common law doctrines of promissory estoppel and equitable estoppel.

5 18. Measure B, if implemented, violates the law as summarized above and further detailed
6 in the allegations below.

7 II. VENUE/JURISDICTION

8 19. Petitioner seeks declaratory relief pursuant to California Code of Civil Procedure
9 section 1060.

10 20. Petitioner seeks injunctive relief pursuant to Code of Civil Procedure sections 526 and
11 527 and Civil Code section 52.1.

12 21. This court has jurisdiction over the writ relief requested in this proceeding under Code
13 of Civil Procedure section 1085.

14 22. This action is brought under, and seeks to rectify violations of, the laws of the State of
15 California including its Constitution.

16 23. All parties exist and reside within the County of Santa Clara, and the acts and/or
17 omissions complained of took place within the County of Santa Clara, making this Court the
18 appropriate venue for this action.

19 III. THE PARTIES

20 24. Petitioner and Plaintiff AFSCME Local 101 is an unincorporated membership
21 association, and a labor organization as defined by Government Code section 3501.

22 25. AFSCME Local 101, including its affiliated Municipal Employees' Federation
23 ("MEF") and Confidential Employees' Organization ("CEO"), is the recognized exclusive bargaining
24 representative for certain non-managerial employees of the defendant and respondent City of San
25 José.

26 26. AFSCME sues on behalf of, and in the interest of, its members employed by the City.
27 Such members are miscellaneous employees and are members of the City's Federated City
28 Employees Retirement System.

27. Measure B purports to affect and substantially impair the rights of AFSCME's members as alleged herein.

28. Defendant and Respondent City of San José is a chartered municipal corporation, and an instrumentality of the State of California, which operates under the authority of the California Constitution and the San José City Charter.

29. Defendant and respondent Debra Figone is sued in her official capacity as City Manager of the City of San José. The City Charter designates the City Manager as the City's chief administrative officer responsible to the City Council for the administration of the City's affairs placed under her charge. Ms. Figone's duties include but are not limited to executing all laws, City Charter provisions, and any acts of the City Council which are subject to enforcement by her subordinates. Executing Measure B is amongst her duties.

30. The Board of Administration for the Federated City Employees Retirement System ("Board") is the Necessary Party in Interest in this case and is appointed by the City Council. The Board is responsible for managing, administering, and controlling the Federated City Employees Retirement System and the retirement fund. (California Constitution, art. XVI, sect. 17; San Jose Municipal Code ("SJMC") § 3.28.100.) Action on the part of the Board is required in order to bring the Federated City Employees Retirement System within compliance with Measure B.

IV. FACTUAL ALLEGATIONS

A. THE FEDERATED CITY EMPLOYEES RETIREMENT SYSTEM

31. Prior to Measure B, and at all times relevant hereto, the City Charter provided for a defined benefit pension plan, and set forth a duty on the part of the City to “create[], establish[] and maintain[] ... a retirement plan or plans for all [of its] officers and employees....” (Charter § 1500.)

32. The Charter further prescribed the minimum benefits due to its non-excluded miscellaneous employees and required the City Council to provide for pension and other benefits through ordinance. (Charter § 1505.) It also stated that in its discretion, the City Council “may grant greater or additional benefits.” (Charter § 1505(e).)

33. Pursuant to duly-enacted ordinances, Defendant adopted and established a Federated City Employees Retirement System providing for certain benefits for covered employees. Such

ordinances, and other laws of the City and State, further provide for the establishment of a Retirement Board to oversee and administer pension benefits for covered employees.

34. The terms and conditions of the plan of benefits prescribed by, and adopted under, these auspices is hereinafter referred to as the "Retirement System," "Federated System," or "System."

35. Generally, full-time miscellaneous employees become members of the System upon acceptance of employment with the City.

36. Prior to Measure B, the System was funded by contributions from both members and the City under the proportions set forth in the Charter. However, member or employee contributions were never assessed or required with respect to the System's unfunded liabilities; rather members only were responsible for contributing towards the "normal cost"¹ of their annually-earned benefits.

37. Therefore, prior to Measure B, the City Charter provided that the funding of benefits under the system was to be computed annually with respect to the normal cost of each employee-member's annual benefit accrual: the Charter and City Ordinances provide that "any [non-excluded] retirement fund, system or plan for or because of current service or current service benefits ..., in relation to and as compared with contributions made by the City for such purpose, shall not exceed the ratio of three (3) for [miscellaneous] employees to eight (8) for the City." (Charter § 1505(c); § SJMC 3.28.710.)

38. Under the System, member contributions are made only on account of current service rendered (SJMC § 3.28.710), excepting limited circumstances -- not relevant here -- where employees may make additional contributions to purchase "prior service credit"². (SJMC §§ 3.28.730, 3.28.740.) Again, members are not and have never been required to make contributions into the System to cover their own or others' unfunded liabilities.

39. Instead, under the Charter, the City has been responsible for ensuring payment of shortfalls between the plan's assets and the actuarially-determined liability for all benefits owed by

¹ The normal cost is the actuarially determined cost of new benefits earned each year by active participants.

² Meaning the purchase of pension credit for years of City service that did not qualify for pension membership

1 the System. Such difference, actuarially determined, represents the System's "unfunded liability,"
2 which fluctuates depending on the System's investment and demographic experience.

3 40. While the City is required to make current service and limited prior service
4 contributions into the retirement system on behalf of members (SJMC §§ 3.28.850, 3.28.890), it is
5 and has been obligated to cover the unfunded liabilities of the retirement system (SJMC § 3.28.880.)

6 41. The form of benefit promised by the City and provided under the System to
7 Petitioner's members was a defined benefit consisting of 2.5% of compensation multiplied by the
8 particular employee's years of employment with the City for which the employee is eligible for credit
9 under the System (i.e. "covered" or "credited" service). The defined benefit also included a
10 guaranteed cost of living adjustment, or "COLA," consisting of a 3% annual increase in the pension
11 benefit.

12 42. Although the right to earn and receive such a defined benefit accrues upon accepting
13 and continuing employment under the System, members become eligible to receive such defined
14 benefit on the earlier of reaching age 55 and completing five years of covered service, or completing
15 a full 30 years of service regardless of age. (SJMC 3.28.1110(A).)

16 43. Under the System, members who become disabled and unable to perform their duties
17 are entitled to a disability retirement benefit.

18 44. The City and the System also provide for payment and funding of health benefits for
19 Federated System retirees.

20 45. To qualify for retiree health benefits, a member must retire under the System and have
21 at least fifteen years of service or receive an allowance that is at least 37.5% of final compensation.
22 Furthermore, a retiree may be eligible for benefits if he/she "[w]ould be receiving an allowance equal
23 to at least [37.5%] of [his/her] final compensation [] if the workers' compensation offset ... did not
24 apply." (SJMC 3.28.1950(A)(3).) If a retiree qualifies for the plan, the retirement system pays one
25 hundred percent of the lowest cost plan that is available to active City employees. If a retiree does
26 not choose the lowest cost plan, he/she must pay the difference between that premium and the
27 premium for the lowest cost plan.
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46. To qualify for retiree dental benefits, a member must retire for disability or service and either have credit for five years of service or more or receive an allowance that is at least 37.5% of final compensation. Furthermore, a retiree is eligible for benefits if he/she "would be receiving an allowance equal to at least [37.5%] of [his/her] final compensation [] if the workers' compensation offset ... did not apply...." If a retiree qualifies for the plan, the retirement fund pays one hundred percent of that members' premiums to an eligible dental plan.

47. The City and the System also provide for a Supplemental Benefit Retiree Benefit Reserve ("SRBR") for the benefit of retired members, survivors of members, and survivors of retired members retired members. If the balance remaining in the Plan's income account [after payment of administrative costs and expenses of the retirement System for the applicable fiscal year] is greater than zero, the [B]oard ... transfer[s] ten percent of the excess earnings to the [SRBR], and [] transfer[s] the remaining ninety percent of the excess earnings to the general reserve." (SJMC 3.28.340(D).) Furthermore, interest on these funds and excess funds are deposited in the SRBR.

B. MEASURE B

48. Measure B seeks to reduce the retirement security of Petitioner's members while simultaneously shifting obligations and debts already incurred by the City unto a small class of individuals, including Petitioner's members.

49. Measure B further seeks to punish members who either challenge its legality or resist the reduction of the retirement benefit to which they are vested and entitled. Specifically, Section 1514-A of Measure B provides that if any of Measure B's terms are "determined to be illegal, invalid or unenforceable as to Current Employees[.]" current employees' salaries shall be reduced by "an equivalent amount of savings."

Suspension and Reduction of COLA Provision

50. With respect to the COLA component of the System's defined retirement benefit, Measure B authorizes the City Council to eliminate or "suspend" payment of the COLA. By its terms Measure B provides the City Council with discretion to suspend the COLA for a period of five years and thereafter may reduce by half the COLA benefit, or continue the suspension.

1 51. Prior to Measure B, miscellaneous employees enjoyed a vested right to an annual three
2 percent increase to their pension benefit after retirement. This served the purpose of ensuring that a
3 retiree's pension kept pace with inflation. (SJMC § 3.400.160.) (It should be noted that System
4 members do not participate in the federal Old Age, Survivor and Disability Insurance (OASDI)
5 program administered by the Social Security Administration, which of course includes a COLA
6 component).

7 52. The COLA component of the System's retirement benefit has been funded by
8 employee and City contributions. Specifically, the normal cost of the COLA component is funded by
9 contributions from members and the City on the same three to eight ratio basis as has been applied to
10 the primary pension benefit. (SJMC § 3.44.00.)

11 53. Measure B, however, provides that the City Council is authorized to suspend COLA
12 payments "in whole or in part" until (and if) "[the City Council] determines that the fiscal emergency
13 has eased." (Section 1510-A). Upon information and belief, such provision applies equally to current
14 employees who retire prior to the adoption of any such resolution suspending the COLA.

15 54. Measure B further provides, that "in the event" the City Council "restores all or part of
16 the COLA" it shall not exceed 3% for "current employees" or "1.5% for Current Employees who
17 opted into the VEP" (*Id.*), and it may only be restored prospectively.

18 55. Measure B therefore reduces vested retirement benefits in the form of permitting
19 elimination and reduction of COLA for both current and future retirees.

20 *Elimination of the Supplemental Benefit Retiree Benefit Reserve ("SRBR")*

21 56. Measure B eliminates of the System's Supplemental Benefit Retiree Benefit Reserve
22 ("SRBR").

23 57. Prior to Measure B, in the event the System had a balance in its operating account
24 after payment of administrative costs and expenses of the retirement System for the applicable fiscal
25 year, the Board of Retirement was required to "transfer ten percent of the excess earnings to the
26 [SRBR], and [to] transfer the remaining ninety percent of the excess earnings to the general reserve."
27 (SJMC 3.28.340(D).) Furthermore, interest on funds and excess funds were deposited in the SRBR.
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1 58. Funds were held in the SRBR for the benefit of retired members, survivors of
2 members, and survivors of retired members.

3 59. Measure B eliminates the SRBR and transfers the assets held in such account to the
4 System's general fund.

5 Changes to the Obligation to Fund City Employee Retirement Programs

6 60. Measure B transfers to employees the responsibility for funding, in part, the System's
7 previously-incurred unfunded liability. Such an obligation has not, heretofore, existed on the part of
8 System members or employees. As set forth above, the Municipal Code and Charter have
9 exclusively placed responsibility on the City for any such incurred liabilities.

10 61. Specifically, in order to retain their vested entitlement to receive their pension
11 benefits, members must personally agree to assume a *pro rata* portion of up to 50% of the City's
12 obligation for the System's unfunded liabilities, in addition to their obligation to make payment of the
13 normal cost of their annual accrued benefits.

14 62. The obligation to assume half of the City's responsibility for financing the System's
15 unfunded liabilities has been computed by the City to equal approximately 16% of gross pay and,
16 accordingly, Measure B caps this obligation at 16% of an employee's gross pay.

17 63. Employees who decline the obligation to assume the City's debt in this manner, under
18 Measure B, are placed into a "Voluntary Election Plan" or "VEP." Such employees, and only those
19 employees who wish not to, or are economically unable to, relinquish their earned and promised
20 pension benefits must, on a going forward basis, pay to the city an excise or assessment against their
21 wages. Measure B designates such funds towards payment of the City's general obligations
22 associated with its accrued past pension liabilities. Those employees who cannot afford to pay the
23 City's excise of 16% of their wages are forced to accept a reduction in their vested right to receive
24 their pension benefits and promised level of retirement security.

25 64. Specifically, with respect to employees who decline to assume a portion of the City's
26 obligation for the System's unfunded liabilities, or are unable to afford the excise imposed against
27 them: The VEP imposes a lower accrual rate for benefits; imposes a later retirement age; increases
28 the years-of-service retirement eligibility gradually each year, indefinitely and with no limit; reduces

1 and caps the annual COLA; redefines the term "final compensation" to exclude the member's
2 compensation that would otherwise have been included in computing the member's pension; and
3 redefines to the member's disadvantage the criteria applied to disability retirements.

4 65. The amount of the wage excise is unrelated to the particular employee's cost of benefits
5 and is not particularized to the employee.

6 66. Measure B's VEP does not present members with a "voluntary" option, as the exercise
7 of such choice is neither volitional nor free from coercion or duress.

8 67. Further, although accepting imposition of the VEP may be more advantageous than
9 remaining in the System as amended by Measure B, both "options" require members to accept a
10 reduction in their vested right to receive promised retirement benefits upon retirement. Those that
11 cannot afford to pay upwards of 16% of their wages to the City's unfunded liability are required to
12 forego their earned and promised pension rights.

13 68. Prior to Measure B, the City's miscellaneous employees had the right to retire on the
14 earlier of reaching age fifty-five or working for the City for thirty years. (*See, e.g.*, SJMC §
15 3.28.1110(A).)

16 69. Specifically, a member's annual service retirement "allowance" – or benefit – was
17 computed with respect to his/her final compensation, which was defined as the "highest average
18 annual compensation earnable by the member during any period of twelve consecutive months of
19 federated city service...." (SJMC § 3.28.030.11.) Such a full service retirement benefit was
20 computed as 2.5% of such final compensation per year of service. Furthermore, one year of service
21 was defined as "1,739 or more hours of federated city service rendered by the member in any
22 calendar year." (SJMC § 3.28.6809(B).)

23 70. Employees who are unable to shoulder the City's obligation for the System's
24 unfunded liabilities must accept, under the VEP, a reduced benefit accrual rate of two percent of final
25 compensation; an increased retirement age of sixty-two; an ever-increasing years-of-service
26 retirement (which increases by six months each year, starting in July of 2017); a reduced COLA of
27 1.5%; "final compensation" redefined as "the average annual pensionable pay of the highest *three*
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1 consecutive years of service"; and an increase in the definition of a year of service to 2,080 hours.
2 (Section 1507-A (emphasis added).)

3 Changes to the System's Disability Retirement Benefit

4 71. Measure B redefines the term "disability" with respect to current employees in a
5 manner that reduces such employees' eligibility for a disability retirement under the System. It
6 further reduces the right to a disability retirement benefit for employees required to enroll into the
7 VEP.

8 72. Specifically, Measure B reduces the maximum benefit that a disabled retiree may
9 receive, reduces the categories of compensation for purposes of computing the benefit; and reduces
10 the annual COLA.

11 73. Prior to Measure B, a miscellaneous employee qualified for a "disability retirement" if
12 his/her "disability ... render[ed] the member physically or mentally incapable of continuing to
13 satisfactorily assume the responsibilities and perform the duties and functions of the position then
14 held by him and of any other position in the same classification of positions to which the city may
15 offer to transfer him, as determined by the retirement board on the basis of competent medical
16 opinion." (SJMC § 3.28.1210.) Prior to Measure B, disabled employees who could fill such positions
17 were nevertheless entitled to a disability retirement if no such position existed or was open.

18 74. Further, members who retire because of a service-connected disability were, prior to
19 Measure B, permitted an "annual allowance" of no less than forty percent of their compensation plus
20 2.5% for each year of service beyond sixteen, to a maximum of seventy-five percent of the member's
21 final compensation. (SJMC § 3.28.1280.)

22 75. With respect to non-service connected disabilities, miscellaneous employees who
23 became members of the System prior to September 1, 1998, were eligible for a non-service connected
24 disability retirement allowance equal to the normal retirement allowance less half a percent for each
25 year the member is younger than age fifty-five. All other members receive an allowance of twenty
26 percent of final compensation plus two percent of final compensation for each year of service in
27 excess of six years, but less than sixteen years, plus 2.5% of final compensation for each year of
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1 service credit in excess of sixteen years, up to seventy-five percent of the member's final
2 compensation. (SJMC § 3.28.1300.)

3 76. Prior to Measure B, disability retirees received an annual three percent COLA. (SJMC
4 §§ 3.44.010, 3.44.160.)

5 77. Measure B substantially impairs both the eligibility to receive and the substantive
6 benefits provided under the System's disability retirement provisions.

7 78. Specifically, Measure B redefines the term "Disability" for purposes of restricting
8 eligibility to receive a disability retirement. Measure B narrows the definition to apply only to
9 employees whose disability "has lasted or is expected to last for at least one year or to result in death"
10 and "cannot perform any other jobs described in the City's classification plan because of his or her
11 medical condition(s)... regardless of whether there are other positions available at the time a
12 determination is made." (Section 1509-A (emphasis added).)

13 79. Thus, under Measure B, a member who suffers debilitating injury may be denied a
14 disability benefit if she can theoretically perform the functions of any classification, even if there is
15 no vacancy available to accommodate such employee.

16 80. Measure B also reduces the disability benefit provided under the System.
17 Specifically, service-connected disability retirees receive fifty percent "of the average annual
18 pensionable pay of the highest three consecutive years of service." Further, employees become
19 eligible for non-service connected disability retirement benefits after five years of service with the
20 City, computed at two percent times final compensation, defined as the average highest three
21 consecutive years. Such an employee may receive a minimum and maximum non-service connected
22 disability retirement of twenty percent and fifty percent, respectively. (Section 1507-A(e).)

23 81. Under Measure B the disability retirement COLA is reduced to 1.5%.

24 82. Furthermore, Measure B shifts the responsibility for determining eligibility for
25 disability retirement benefits from the Board to "an independent panel of medical experts" subject to
26 a "right of appeal to an administrative judge."

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1 Funding of the City's Retiree Health Obligations

2 83. Pursuant to the SJMC, members of the Federated System who satisfy certain
3 conditions related to service or disability retirement are entitled to receive retiree medical and dental
4 benefits. (SJMC §§ 3.28.1950, 3.28.2000.)

5 84. Members of the System enjoy a right to retiree healthcare benefits that is vested by
6 explicit or implied contract. Indeed, employees contribute to the cost of retiree health through their
7 own payroll deductions.

8 85. Retiree healthcare benefits are a form of deferred compensation for present service.

9 86. Retiree healthcare benefits are also provided as a result of written agreements between
10 the City and labor organizations, including Petitioner.

11 87. Prior to Measure B, AFSCME members have contributed to their retiree health
12 insurance on a one-to-one basis with the City.

13 88. Prior to Measure B the City has not, and did not, make contributions at a level
14 sufficient to fully prefund its retiree health obligations. Rather, the City paid for its retiree health
15 obligations through a "pay-as-you-go" method, utilizing both its own and employee contributions
16 towards providing health benefits to its retirees. Where such amounts were insufficient to pay the
17 city's health obligations, the City was responsible for such unfunded amounts.

18 89. Although active employees contributed in the form of payroll deductions towards the
19 costs of retiree healthcare, they were not responsible for funding the full cost of the Retiree
20 Healthcare Plan's ("RHC Plan") unfunded liabilities.

21 90. On information and belief, the City has developed an Annual Retirement Cost or
22 "ARC" that incorporates the City's predicted normal cost of retiree health obligations and the cost of
23 promised but unfunded benefits to current and future retirees (*i.e.* unfunded liabilities).

24 91. Beginning in or around 2009, the City imposed increasingly significant layoffs of its
25 employees and further reduced wages of those that remained by as much as twelve percent of
26 pensionable pay. As a result, the City's pay-as-you go method of funding its retiree health
27 obligations became untenable as the amount of employee contributions to the ARC necessarily
28 declined due to such layoffs and pay reductions. The City's actions further increased the pool of

1 retirees and consequently its retiree health obligations, as employees opted to retire rather than be
2 placed on lay-off or continue to work under significant pay reductions.

3 92. Measure B attempts to shift the City's obligation associated with previously-incurred
4 and promised retiree health benefits onto its current employees. Measure B seeks to make current
5 employees responsible not only for 50% of the normal cost of their annually-incurred retiree health
6 obligations, but also for the City's unfunded liabilities with respect to all of its retiree healthcare
7 obligations. (Measure B, § 1512-A(a) (making active employees responsible for contributing "a
8 *minimum* of [fifty percent] of the cost of retiree healthcare, including both normal cost and unfunded
9 liabilities".))

10 93. Upon information and belief, with respect to members of the Petitioner, such an
11 obligation imposes an excise on current employee compensation for the payment of the City's
12 general obligations.

13 94. Such excise is substantially greater than the amount of benefits each such employee is
14 expected to receive under the RHC Plan. As a result, such employees are paying for benefits
15 unassociated with their City service.

16 95. In addition, the excise is imposed for the stated purpose of paying the City's general
17 obligations, that is, the unfunded liabilities of the City retirement system

18 96. Measure B further attempts to set a framework to severely diminish the value of the
19 "low cost plan" to which members are entitled upon retirement.

20 97. Measure B also purports to "unvest" the right to retiree health notwithstanding the fact
21 that employee members of petitioner have directly contributed through payroll deduction to the cost
22 of such benefits. (Measure B, Section 1512-A(b) (stating "[n]o retiree healthcare plan or benefit shall
23 grant any vested right..."; providing City with right to "amend, change or terminate any [RHC P]lan
24 provision".)) Such provision, as alleged below, is an unconstitutional taking and impairment of
25 contract, and violates due process, as guaranteed by the California Constitution.

26 98. Measure B also redefines the benefit provided under the RHP as "the medical plan
27 which has the lowest monthly premium available to any active employee in either the Police and Fire
28 Department Retirement Plan or [the System]." (Section 1512-A(c).) This effectively fixes employee

1 benefits to the lowest cost plan City-wide, whether or not that plan was bargained for or imposed
2 upon a union other than AFSCME by the City.

3 99. As a result, Measure B reduces the expectations of Petitioner's members by reducing
4 the amount of Retiree health premium payment available to them upon retirement.

5 Retroactive Shifting of Public Debt to a Small Class of Individuals

6 100. Measure B shifts a substantial burden onto current employees for the financing
7 of the System's, Plan's, and the RHC Plan's unfunded liabilities.

8 101. Such unfunded liabilities represent the previously-incurred obligations of the City with
9 respect to benefits earned by current and future retirees of the City.

10 102. With respect to the System, under Measure B, employees who refuse to forego their
11 vested right to their pension benefit must make "additional retirement contributions in increments of
12 4% of pensionable pay per year, up to a maximum of 16%, but no more than 50% of the costs to
13 amortize any pension unfunded liabilities...." (Section 1506-A(b).)

14 103. The intent, purpose and effect of Measure B is to impose a fine on those employees
15 who refuse to relinquish their constitutionally-protected right to receive their earned and promised
16 pensions. By imposing such fine on only those who do not accept the City's demands to amend its
17 pension obligations, the City is imposing a punishment or penalty on a select group of individuals.

18 104. Prior to Measure B, the City was and has been obligated to pay for any such unfunded
19 liabilities. Further, until the VEP is implemented, Section 1506-A of Measure B governs all
20 members of the System, obligating them to shoulder the City's debts related to the System's
21 unfunded liabilities.

22 105. Similarly, if a court finds Section 1506-A(b) of Measure B to be "illegal, invalid or
23 unenforceable" then the City is purportedly empowered to require employees to pay down the City's
24 obligations for the System's unfunded liabilities. (Section 1514-A of Measure B.)

25 106. Measure B places on current employees the responsibility of funding the cost of their
26 benefits in addition to the unfunded liabilities not associated with their own service, including the
27 already-accrued retiree health benefits obligations and the benefits payable to current retirees.
28

1 107. Measure B requires a small class of individuals, namely current employees with
2 respect to the RHC Plan and current employees who refuse to forego their vested benefits under the
3 System's VEP plan, to retroactively fund liabilities of the public.

4 108. Measure B improperly imposes on members an obligation to fund a portion of the
5 City's general obligations.

6 109. Measure B imposes severe retroactive liability on a limited class of parties that could
7 not have anticipated such liability, and in a substantially disproportionate manner.

8 110. Moreover it does so for the purpose of punishing those who refuse to relinquish their
9 constitutionally-protected right to receive the pension they have earned and were promised. There are
10 fairer and easier methods of achieving the same result the City seeks to achieve here through the
11 imposition of a wage fine or excise.

12 111. Under the California constitution such retroactive legislation deprives individuals of
13 legitimate expectations and upsets settled transactions.

14 112. Retroactive lawmaking is of particular constitutional concern because of its use, as
15 with Measure B, is a means of retribution against unpopular groups.

16 113. Measure B is further an improper imposition of public debt on a small group of
17 individuals.

18 114. In that regard, Measure B is an unlawful retroactive law that violates the California
19 Constitution's takings and due process clauses, and such Constitution's prohibition of *ex post facto*
20 laws and bills of attainder.

21 VIII. CAUSES OF ACTION

22 **FIRST CAUSE OF ACTION**

23 **Unconstitutional Impairment of Contract** 24 (Cal. Const. Art. I § 9 and Cal. Civ. Code § 52.1³)

25 115. Plaintiff hereby incorporates by reference the preceding paragraphs as though set forth
26 fully herein.

27
28 ³ Plaintiff may sue in Superior Court for a violation of its members' constitutional rights pursuant to Civil Code Sect.
52.1.

1 116. California's Constitution, Article I, section 9, prohibits the state and its
2 instrumentalities, including the City, from passing a law that impairs the obligation of contracts
3 ("Contracts Clause").

4 117. Modifications to public employee retirement plans affecting current employees must
5 be reasonable under California's Contracts Clause. Changes can be reasonable only if (1) they bear
6 some material relation to the theory of a pension system and its successful operation and (2) changes
7 in a pension plan that result in a disadvantage to employee are accompanied by comparable new
8 advantages.

9 118. Miscellaneous employees enjoy vested contractual rights to the System, Plan, their
10 retirement benefits, and any enhancements implemented once they begin working with the City.

11 119. Measure B substantially impairs these rights without providing a comparable
12 advantage.

13 120. Under California law, these principles apply to changes in the method of funding of
14 pension systems, and such changes cannot be imposed on members to their disadvantage, when there
15 is no corresponding advantage.

16 121. Measure B, and the funding mechanisms providing for reduction in wages and shifting
17 of liabilities to a small class of individuals who derive no benefits from such liabilities, is contrary to
18 the theory of a pension system.

19 122. Measure B interferes and impairs those contractual rights in a way that is
20 unreasonable.

21 123. Measure B's provisions bear no material relation to the theory of a retirement system
22 or its successful operation; they simply allow the City to escape from its obligation to provide its
23 employees with these form of deferred compensation with which it previously enticed them into its
24 employ.

25 124. Measure B's provisions harm the effected employees without providing them with any
26 comparable advantage, commensurate benefit, or compensation.

27 125. Therefore, Measure B violates Article I, Sect. 9 of the California Constitution as it
28 applies to existing plan participants and is unconstitutional.

SECOND CAUSE OF ACTION
Unconstitutional Bill of Attainder
(Cal. Const. Art. I § 9 and Cal. Civ. Code § 52.1)

126. Plaintiff hereby incorporates by reference the preceding paragraphs as though set forth fully herein.

127. California's Constitution, Article I, section 9 prohibits the state and its instrumentalities, including the City, from passing bills of attainder.

128. Measure B is a legislative act. It was initially promulgated and put to a vote of the electorate by the City Council, and it was then approved by the City's electorate.

129. Measure B's penalty provisions -- which impose against those employees who do not voluntarily relinquish their right to receive their earned and promised pension a 16% wage deduction -- affects their lives and is a confiscation of property, earned wages to which they would otherwise be entitled.

130. A bill of attainder includes legislative acts that unconstitutionally impact property rights.

131. Measure B exclusively targets and penalizes current and future City employees ("public employees") for harsher treatment than other residents of the City.

132. Measure B imposes a forfeiture or fine on a select class of individuals for the purpose of punishing them for refusing to relinquish their constitutionally-protected right to receive the earned and promised pension.

133. Although the City asserts this fine is necessary to its budget, fairer methods of generating revenue exist for the purpose of paying the City's general obligations.

134. Further, although the City and the Measure indicate these provisions are necessary to ensure parks, libraries and other services, it has sought to provide to its management employees, employees not represented by Petitioner, retroactive salary increases.

135. Upon information and belief, the City has sought to impose this fine against petitioners' members, among others, because petitioner and its members have (1) refused to voluntarily forego pension rights previously sought by the City; (2) have filed unfair labor practice charges against it before the Public Employees Relations Board.

1 136. In enacting Measure B, at the outset, the City adopted and drafted ballot language that
2 was deemed by the Sixth District Court of Appeals as "charged," "biased" and not neutral.

3 137. The City's intent to punish City employees is reflected in internal City
4 communications. For example, an email from City Retirement Services Director to the City Manager
5 and others, described a large percentage of City employees as "totally useless" and "marginally
6 employed" and that "benefit and salary reductions are less important."

7 138. The City and its agents have indicated that they are waging a "war" on Petitioner.

8 139. Measure B was adopted and passed to punish petitioner and more particularly, those
9 members/employees who do not agree to a reduction to their earned and promised pension.

10 140. By imposing a fine against employees who do not agree to relinquish their
11 constitutionally-protected right to receive their earned and promised pension, Measure B singles them
12 out for punishment.

13 141. Because Measure B requires employees to relinquish components of their vested
14 benefits or suffer a dramatic fine imposed against their wages, up to 16%. Such wage reduction, for
15 Petitioners' members who have already received a 12% reduction to their pay since 2011, will force
16 them either (a) from their jobs or (b) to relinquish the pension rights, as they are unable to support
17 themselves or their families on their post-exercise income.

18 142. Under the constitution, a fine is a characteristically punitive sanction.

19 143. The fine imposed by Measure B is intertwined with employees' exercise of their
20 constitutional right.

21 144. Measure B penalizes current City employees by imposing the penalty of a fine, unless
22 such employees agree to forego their Constitutionally-protected rights to receive their full Pension
23 benefit.

24 145. Such excise, consisting of up to 16% of their salary, is a severe penalty, and is
25 imposed out of a punitive motivation.

26 146. Such punishment is inflicted on this small class of individuals by subjecting them to
27 adverse economic treatment. Measure B further punishes such employees by imposing on them a
28

1 “poison pill” provision whereby if they seek to enforce their Constitutionally-protected right to be
2 free from Bills of Attainder and other unconstitutional treatment, they are further penalized.

3 147. Measure B is therefore an unlawful Bill of Attainder.

4 **THIRD CAUSE OF ACTION**
5 **Unconstitutional Taking of Private Property**
6 (Cal. Const. Art. I § 19 and Cal. Civ. Code § 52.1)

7 148. Plaintiff hereby incorporates by reference the preceding paragraphs as though set forth
8 fully herein.

9 149. A public entity may not take private property for public use in the absence of just
10 compensation. (Cal. Const. art I § 19.) Nor may a public entity pass regulations having the effect of
11 depriving individuals of their property.

12 150. Miscellaneous employees enjoy vested contractual and property rights under the
13 System, once they begin work for the City.

14 151. Measure B is a taking of such rights.

15 152. Similarly, retirement benefits promised in order to induce employment with the City
16 are a form of deferred compensation. Measure B constitutes a taking of such property.

17 153. Measure B has a drastic fiscal impact on public employees because it significantly
18 abridges their vested right to receive certain retirement benefits.

19 154. Furthermore, Measure B constitutes an unconstitutional taking because it divests
20 public employees’ salaries to finance the System’s unfunded liabilities and employee retirement
21 plans, without providing such employees with just compensation for this divestiture.

22 155. Measure B seizes a greater portion of their salaries to finance the City’s unfunded
23 liabilities related to pension and retiree health benefits. In other words, because Measure B seizes
24 wages in order to pay for the previously-incurred retiree health and Pension obligations associated
25 with others, it constitutes an unconstitutional taking.

26 156. Although Measure B significantly infringes upon the vested property rights of plaintiff
27 and those it represents, it does not provide them with any form of comparative advantage. Therefore,
28 it amounts to an unconstitutional taking of private property for a public purpose without just
compensation.

1 157. Measure B further constitutes an unlawful retroactive law in violation of the California
2 Constitution's takings clause.

3 **FOURTH CAUSE OF ACTION**
4 **Unconstitutional Taking of**
5 **Private Property Without Due Process**
6 (Cal. Const. art. I § 7 and Cal. Civ. Code § 52.1)

7 158. Plaintiff hereby incorporates by reference the preceding paragraphs as though set forth
8 fully herein.

9 159. California's Constitution, Article I, section 7, provides "A person may not be
10 deprived of ... property without due process of law."

11 160. Miscellaneous employees enjoy vested contractual and property rights to the pension
12 benefits set forth under the System, and any enhancements made during their term of employment
13 with the City. This includes the right to a COLA and retiree healthcare benefits.

14 161. Measure B violates the members' rights to substantive due process guaranteed by the
15 California constitution by taking their vested property rights without affording them a comparable
16 advantage or commensurate benefit or compensation.

17 162. Measure B further constitutes an unlawful retroactive law in violation of the California
18 Constitution's Due Process clause.

19 **FIFTH CAUSE OF ACTION**
20 **Violation of California's Pension Protection Act**
21 (Cal. Const. art. XVI § 17 and Cal. Civ. Code § 52.1)

22 163. Plaintiff hereby incorporates by reference the preceding paragraphs as though set forth
23 fully herein.

24 164. The California Constitution gives public sector pension or retirement systems the "sole
25 and exclusive fiduciary responsibility" over the system's assets and its administration. (Cal. Const.
26 art. XVI §§ 17, 17(a).) It also holds that system assets are "trust funds and shall be held for the
27 exclusive purposes of providing benefits to participants in the pension or retirement system and their
28 beneficiaries...." (Cal. Const. art. XVI § 17(a).)

1 165. The California Constitution states that “the retirement board of a public pension or
2 retirement system shall have plenary authority and fiduciary responsibility for investment of moneys
3 and administration of the system...” subject to specified conditions. (Cal. Const. art XVI § 17.)

4 166. It further provides that the Board “shall have the sole and exclusive fiduciary
5 responsibility over the assets of the public pension or retirement system[,]” and “it shall also have the
6 sole and exclusive responsibility to administer the [S]ystem in a manner that will assure prompt
7 delivery of benefits and related services to the participants and their beneficiaries.” Furthermore, the
8 “assets of [the System] are trust funds and shall be held for the exclusive purposes of providing
9 benefits to participants in the [System] and their beneficiaries and defraying reasonable expenses of
10 administering the [S]ystem.” (Cal. Const. art XVI § 17(a).)

11 167. A Retirement Board’s “duty to its participants and their beneficiaries shall take
12 precedence over any other duty.” (Cal. Const. art XVI § 17(b).) Further, the Board’s “exclusive
13 fiduciary responsibilit[y] ... to provide for actuarial services in order to assure the competency of the
14 assets of the” System. (Cal. Const. art XVI § 17(e). *See also* SJMC § 3.28.350(B).)

15 168. The City’s Municipal Code grants real party in interest, the Retirement Board,
16 exclusive control over investing and administering of the retirement fund. (SJMC § 3.28.310.)

17 169. The Code charges the Board with investing and reinvesting fund assets, which are
18 “held for the exclusive purposes of providing benefits to members of the plan and their beneficiaries
19 and defraying reasonable expenses of administering the plan.” (SJMC § 3.28.350(A).)

20 170. Amongst its other responsibilities, the Board also determines employee eligibility for
21 receipt of retirement benefits, the calculation of employer and member contributions, and the
22 distribution of benefits to retirees.

23 171. The California Constitution also requires that the “members of the retirement board of
24 a public pension or retirement system shall discharge their duties with respect to the system solely in
25 the interest of, and for the exclusive purposes of providing benefits to, participants and their
26 beneficiaries, minimizing employer contributions thereto, and defraying reasonable administrative
27 expenses of administering the system.” (Cal. Const. art. XVI § 17(a).) Also, a retirement board’s
28

1 duty to its participants and their beneficiaries shall take precedence over any other duty.” (Cal. Const.
2 art. XVI § 17(b).)

3 172. Measure B requires that when the Necessary Party in Interest adopts retirement plans
4 under the Federated System, it “minimize any risk to the City and its residents....” (Section 1513-
5 A(a).) Requiring that Necessary Party in Interest consider the risk of such a plan to any other party
6 besides its participants and beneficiaries directly contradicts its primary fiduciary responsibility to
7 Plan participants and beneficiaries.

8 173. Measure B requires that all “plans adopted pursuant to the Act ... minimize any risk to
9 the City and its residents” (Section 1513-A(a).) Again, this command contravenes the Board’s
10 primary fiduciary duty to Plan participants and beneficiaries.

11 174. Section 1513-A of Measure B sets forth certain actuarial requirements that usurp the
12 Board’s plenary power and exclusive fiduciary responsibility, as mandated by California’s
13 Constitution, to provide for actuarial services to ensure the competency of the assets” of the System.

14 175. For these reasons Measure B is in conflict with and preempted by the California
15 Constitution.

16 **SIXTH CAUSE OF ACTION**

17 **Violation of Constitutional Right to Petition** 18 (Cal. Const. art. I §§ 2, 3 and Cal. Civ. Code § 52.1)

19 176. Plaintiff hereby incorporates by reference the preceding paragraphs as though set forth
20 fully herein.

21 177. Miscellaneous employees enjoy vested contractual rights to the Plan, its benefits, and
22 any enhancements once they begin working with the City. This includes the right to pension
23 payments with a COLA and retiree healthcare benefits.

24 178. “The people have the right to ... petition government for redress of grievances....”
25 (Cal. Const. art. I § 3.)

26 179. Section 1514-A of Measure B holds that if Section 1506-A(b) “is determined to
27 illegal, invalid or unenforceable to Current Employees[,]” current employees’ salaries shall be
28 reduced by “an equivalent amount of savings.” The penalty Section 1514-A imposes for a successful

1 challenge to Section 1506-A(b) is equally detrimental to members as the burden imposed upon them
2 by Section 1506-A(b) itself.

3 180. The penalty imposed by Measure B for successfully mounting a legal challenge to
4 Measure B is unrelated to the theory of a pension system and violates the Constitutionally protected
5 right to petition.

6 181. Measure B impermissibly imposes a cost or risk upon the exercise of the right to
7 petition the courts for redress, and its purpose and effect is to chill the assertion of constitutional
8 rights by penalizing those who choose to exercise them.

9 182. Section 1514-A of Measure B deters members from challenging Measure B by
10 imposing an unreasonable, burdensome, legally unauthorized, and unrelated penalty for successfully
11 invoking the Constitutional right to petition the courts.

12 183. Measure B discourages the exercise of a fundamental right and therefore violates Cal.
13 Constitution Article I, Sections 2 and 3.

14 **SEVENTH CAUSE OF ACTION**
15 **Illegal *Ultra Vires* Tax, Fee or Assessment**
(Cal. Const. Art. I, § 7 & Civ. Code § 52.1)

16 184. Plaintiff hereby incorporates by reference the preceding paragraphs as though set forth
17 fully herein.

18 185. Measure B imposes on current and future employees the obligation to Fund the city's
19 general obligation for the unfunded liabilities associated with its pension System and Retiree
20 Healthcare Plan.

21 186. Measure B accomplishes this by imposing an excise tax on City employee wages for
22 the purpose of funding the City's general obligations, namely the unfunded liabilities of its pension
23 and retiree health system.

24 187. The tax is imposed on those who do not forego their earned and promised pension
25 benefits by opting into the City's proposed VEP program.

26 188. The excise imposed is unrelated to the individual employee's pension or the City's
27 unfunded liabilities associated with such pension. The excise impose on employees is neither related
28

1 to their hours or terms of employment, their classification, years of service, hours or any other indicia
2 of their employment.

3 189. The excise is a means of disbursing the cost of government, that is, the provision of
4 essential government functions. The city has and does characterize its obligations to fund pension and
5 retiree benefits as essential government functions, and has sought approval for various retiree health
6 funding mechanisms from the IRS based on the premise that its retirement obligations were essential
7 government functions.

8 190. The excise imposed on certain employees' wages is unrelated to employee
9 compensation, and is therefore in the nature and character of a tax.

10 191. A government such as the City may not withhold benefits on the condition that the
11 prospective recipient surrender constitutional rights. Here in order to avoid the imposition of the
12 wage excise, the City has required employees to surrender constitutionally-protected rights to their
13 earned and promised pensions.

14 192. The city has singled-out a class or individuals for distinctive treatment on an
15 impermissible and unconstitutional basis; namely, their refusal to relinquish certain pension rights.

16 193. Here the excise tax establishes at least four similarly-situated classes of subgroups,
17 and singles out only one group for taxation: (1) City employees who do not relinquish their pension
18 rights voluntarily; (2) City employees who do relinquish their pension rights; (3) new City employees
19 and (4) employees employed by entities other than the City. Measure B imposes a tax only on the
20 first group.

21 194. There is no rational basis to treating these groups differently where the city seeks to
22 fund its general obligations necessary to essential government functions.

23 195. Because the excise is based on distinctions intertwined with constitutionally-protected
24 rights, that is, the right to receive an earned and promised pension, the excise is subject to strict
25 scrutiny review.

26 196. Further, the payments imposed by Measure B have a discriminatory effect based on
27 wealth, namely, those City employee who are unable to shoulder the burden of of a 16% excise have
28 no choice but to forego their right to their earned pension.

1 197. The excise is a tax as that term is defined by Article 13(C) of the California
2 constitution, namely, it is a "levy, charge or exaction of any kind imposed by a local government."

3 198. The excise imposed by Measure B violated government code 17041.5.

4 199. Rather than impose upon employees the cost of their own, incurred benefits, Measure
5 B imposes on employees an excise to raise funds for the payment and funding of general obligations
6 of the City, namely the already-incurred liabilities of future retirees and the benefits provided to
7 current retirees.

8 200. Thus, the manner in which the costs allocated by the excise to the payors do not bear a
9 fair or reasonable relationship to the payers' burdens on, or benefits received from, the governmental
10 activity.

11 201. Under California law, permissible fees must be related to the overall cost of the
12 governmental regulation. A fee, excise or tax may not exceed the reasonable cost of regulation with
13 the generated surplus used for general revenue collection. An excessive fee that is used to generate
14 general revenue becomes a tax.

15 202. The excises imposed by Measure B are excessive as they are not related to the cost of
16 the individual employees' benefits, are unrelated to their employment or service to the City, and are
17 imposed in order to subsidize or fund the City's own, previously incurred, obligations.

18 203. The real object purpose and result of the payroll excise is to impose a wage tax for the
19 purpose of funding the City's general obligations.

20 204. The excises further offend principles of equal protection under the California
21 Constitution.

22 205. Statutes imposing fees, excises or taxes violate the California Constitution's equal
23 protection clause if they select one particular class of persons for a species of taxation without
24 rational basis.

25 206. Measure B violates the California Constitution's equal protection provision to the
26 extent it imposes liability upon one person for the support of another not obligated to support such
27 person. Thus, there is no rational basis for levying the excise exclusively upon members.

28 ///

EIGHTH CAUSE OF ACTION
Promissory Estoppel and Equitable Estoppel

207. Plaintiff hereby incorporates by reference the preceding paragraphs as though set forth fully herein.

208. Promissory estoppel serves as consideration in order to enforce a bargained-for agreement. That is, the reliance on a promise made by one party serves as a basis to enforce such promise in law or equity.

209. Estoppel applies to claims against the government, particularly where the application of the doctrine would further public policies and prevent injustice.

210. The City, through its Municipal Code, Charter and communications with employees and their labor organizations represented that employees were not liable to finance public debt, or the System's or RHC Plan's unfunded liabilities.

211. The City further represented that employees would earn benefits and have the right to receive a certain level of benefits. In reliance thereon, such members and employees accepted and continued in employment, and made payroll contributions of their own into the System and RHC Plan.

212. The City should have reasonably expected these promises to encourage the miscellaneous employees to accept employment with it and continue working for it until they qualified for service retirement.

213. The City violated these promises when it adopted Measure B by reducing benefits and shifted the burden of financing its unfunded liabilities upon miscellaneous employees.

NINTH CAUSE OF ACTION
REQUEST FOR DECLARTORY RELIEF
(Code of Civ. Pro. § 1060)

214. Plaintiff hereby incorporates by reference the preceding paragraphs as though set forth fully herein.

215. Measure B requires that the City Council adopt ordinances to "implement and effectuate [its] provisions..." Unless relief is granted, Measure B becomes effective immediately and sets as a goal that "such ordinances shall become effective no later than September 30, 2012."

216. An actual controversy has arisen and now exists between Plaintiff and Defendants as to Defendants' duties with respect to implementation of Measure B.

217. Plaintiff contends that Measure B violates the “Contracts Clause” and prohibition on “Bills of Attainder” (Cal. Const. art. I § 9), “Taking Clause” (Cal. Const. art. I § 19), “Due Process Clause” (Cal. Const. art. I § 7), “Pension Protection Act” (Cal. Const. Art. XVI § 17), prohibition on unlawful excises (Cal. Const. art. I § 7), and right to petition the courts (Cal. Const. art. I §§ 1, 2) pursuant to the state Constitution.

218. Plaintiff is informed and believes that the City disputes the allegations contained within this Complaint and Petition and contends that it has a legal duty to implement Measure B as a result of its adoption by the voters of Defendant City.

219. Plaintiff desires a judicial determination of their rights and a declaration of whether Measure B violates the aforementioned sections of the California Constitution, the City Charter, SJMC, and/or provisions of the Plan.

220. A judicial determination is necessary and proper at this time under these circumstances in order to determine the duties and obligations of the parties with respect to Measure B.

TENTH CAUSE OF ACTION
REQUEST FOR INJUNCTIVE RELIEF
(Code of Civ. Pro. §§ 525, 526, and 526(a))

221. Plaintiff hereby incorporates by reference the preceding paragraphs as though set forth fully herein.

222. Plaintiff and groups, residents, registered voters, and taxpayers of the City will suffer irreparable harm as a result of the City's expenditure of staff time and taxpayer funds in connection with implementation of Measure B.

223. Furthermore, members represented by AFSCME will suffer irreparable harm from the constitutional violations at issue.

224. Plaintiff can demonstrate a high-likelihood of success on the merits of its claim that Measure B violates the aforementioned provisions of the California Constitution, the City Charter, Municipal Code, and agreements between the parties.

1 225. Plaintiff has no plain, speedy, or adequate remedy at law.

2 226. Plaintiff's members will suffer irreparable harm in the event the City is not enjoined
3 from implementing Measure B.

4 227. The injunctive relief Plaintiff seeks is prohibitory in nature, and it seeks to restrain
5 and/or prohibit Defendant City from taking any steps to implement, enforce, or otherwise give effect
6 to Measure B.

7 **ELEVENTH CAUSE OF ACTION**
8 **PETITION FOR WRIT OF MANDATE**
9 (Code of Civ. Pro. § 1085)

10 228. Plaintiff hereby incorporates by reference the preceding paragraphs as though set forth
11 fully herein.

12 229. Respondent City, and those public officers and employees acting by and through its
13 authority — including Necessary Party in Interest — have a clear, present, and ministerial duty to
14 implement only those ordinances and regulations that are not in conflict with the California
15 Constitution. Respondent City has failed to perform its duty to comply with those requirements to
16 the extent it intends to implement the provisions of Measure B.

17 230. Measure B violates Const. art. I, sects. 1, 2, 7, 9, 19; Const. art. XVI, sect. 17 of the
18 California Constitution; the City Charter; the SJMC; and the terms of the Plan.

19 231. Petitioner is beneficially interested in a peremptory writ of mandate to compel
20 Respondent City, and those public officers and employees acting by and through its authority, to
21 perform their duties imposed by law, including refraining from implementing the provisions of
22 Measure B.

23 232. Plaintiff has no plain, speedy or adequate remedy at law.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff-Petitioner prays for the following relief:

26 1. A declaration that Measure B cannot be applied to the AFSCME members working for the
27 City on or before June 5, 2012;
28

1 2. A declaration ordering defendants and respondents to not apply the terms of Measure B
2 against petitioner-plaintiff's members currently in the City's employ, and restoring to such employees
3 all rights and benefits purportedly abridged by Measure B.

4 3. A permanent injunction prohibiting the defendants and petitioners from applying or
5 otherwise enforcing any part of Measure B against members working for the City before June 5,
6 2012;

7 4. A peremptory writ mandating defendants and respondents and the Board to apply all Plan
8 provisions, rights and benefits in effect before June 5, 2012, to AFSCME members and prohibiting
9 the application or implementation of Measure B to them;

10 5. For attorneys' fees pursuant to California Code of Civil Procedure section 1021.5,
11 Government Code Section 800, or otherwise;

12 6. For costs of suit herein incurred; and,

13 7. For such costs and further relief as the Court deems just and proper.

14
15 Dated: February 8, 2013

BEESON, TAYER & BODINE, APC

16
17 By: 

TEAGUE P. PATERSON
VISHTASP M. SOROUSHIAN
Attorneys for Plaintiff and Petitioner
AFSCME LOCAL 101

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is Beeson, Tayer & Bodine, Ross House, Suite 200, 483 Ninth Street, Oakland, California, 94607-4051. On this day, I served the foregoing Document(s):

**FIRST AMENDED COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF AND PETITION FOR WRIT OF MANDAMUS**

☒ **By Mail** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

☐ **By Personally Delivering** a true copy thereof, to the parties in said action, as addressed below in accordance with Code of Civil Procedure §1011.

☐ **By Messenger Service** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure § 1011, by placing a true and correct copy thereof in an envelope or package addressed to the persons at the addresses listed below and providing them to a professional messenger service.

☐ **By UPS Overnight Delivery** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(c), by placing a true and correct copy thereof enclosed in a sealed envelope, with delivery fees prepaid or provided for, in a designated outgoing overnight mail. Mail placed in that designated area is picked up that same day, in the ordinary course of business for delivery the following day via United Parcel Service Overnight Delivery.

☐ **By Facsimile Transmission** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(e).

☐ **By Electronic Service.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California, on this date, February 11, 2013.



Tanya Gatt

SERVICE LIST

<p>Greg McLean Adam, Esq. Jonathan Yank, Esq. Gonzalo C. Martinez, Esq. Amber L. West, Esq. CARROLL, BURDICK & McDONOUGH LLP 44 Montgomery Street, Suite 400 San Francisco, CA 94104</p> <p><i>Attorneys for Plaintiff, SAN JOSE POLICE OFFICERS' ASSOCIATION (Santa Clara Superior Court Case No. 112CV225926)</i></p>	<p>Arthur A. Hartinger, Esq. Jennifer L. Nock, Esq. Linda M. Ross, Esq. Michael C. Hughes MEYERS, NAVE, RIBACK, SILVER & WILSON 555 12th Street, Suite 1500 Oakland, CA 94607</p> <p><i>Attorneys for Defendants, THE CITY OF SAN JOSE AND DEBRA FIGONE</i></p>
<p>John McBride, Esq. Christopher E. Platten, Esq. Mark S. Renner, Esq. WYLIE, McBRIDE, PLATTEN & RENNER 2125 Canoas Garden Avenue, Suite 120 San Jose, CA 95125</p> <p><i>Attorneys for Plaintiffs/Petitioners, ROBERT SAPIEN, MARY McCARTHY, THANH HO, RANDY SEKANY AND KEN HEREDIA (Santa Clara Superior Court Case No. 112-CV-225928)</i></p> <p>AND</p> <p><i>Plaintiffs/Petitioners, JOHN MUKHAR, DALE DAPP, JAMES ATKINS, WILLIAM BUFFINGTON AND KIRK PENNINGTON (Santa Clara Superior Court Case No. 112-CV-226574)</i></p> <p>AND</p> <p><i>Plaintiffs/Petitioners, TERESA HARRIS, JON REGER, MOSES SERRANO (Santa Clara Superior Court Case No. 112-CV-226570)</i></p>	<p>Harvey L. Leiderman, Esq. REED SMITH, LLP 101 Second Street, Suite 1800 San Francisco, CA 94105</p> <p><i>Attorneys for Defendant, CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE (Santa Clara Superior Court Case No. 112CV225926)</i></p> <p>AND</p> <p><i>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1961 SAN JOSE POLICE AND FIRE DEPARTMENT RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV225928)</i></p> <p>AND</p> <p><i>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1975 FEDERATED CITY EMPLOYEES' RETIREMENT PLAN (Santa Clara Superior Court Case Nos. 112CV226570 and 112CV22574)</i></p> <p>AND</p> <p><i>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE FEDERATED CITY EMPLOYEES RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV227864)</i></p>

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Received
FEB 12 2013
meyers/nave



135.027

K. Thomas / J. Foley

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To:

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ADDRESS SERVICE REQUESTED

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